

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CARL SCAGGS and NELLIE SCAGGS,

Plaintiffs,

v.

3M COMPANY, AS SUCCESSOR BY
MERGER TO MINNESOTA MINING &
MANUFACTURING COMPANY AND/OR
ITS PREDECESSORS/SUCCESSORS IN
INTEREST

and

MINE SAFETY APPLIANCES,

Defendants.

Cause No. 4:08-CV-01163

**MSA'S PRELIMINARY MOTION TO EXCLUDE EXPERT TESTIMONY OF
DARRELL BEVIS AND CHING-TSEN BIEN**

Comes now MSA and moves this Court to exclude testimony offered by Plaintiffs' experts Darrel Bevis and Ching-tsen Bien.

Mr. Bevis was deposed on September 1, 2010 and Mr. Bien on September 8, 2010. As of the time of the filing of this preliminary motion, MSA has available only rough drafts of both of these deposition transcripts. Once MSA has the full transcripts available and has had time to review the same, MSA will file a supplemental motion to exclude the testimony of Mr. Bevis and Mr. Bien. MSA hereby requests leave to supplement this motion by September 30, 2010, once MSA has received and had time to review the final transcripts.

A trial judge faced with a proffer of expert testimony must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Daubert v. Merrell Dow Pharmaceuticals*,

Inc., 509 U.S. 579, 592-593 (1993). This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid. *Id.* “Proposed testimony must be supported by appropriate validation-i.e., “good grounds” based on what is known.” *Id.* at 590.

Based on the working draft of the deposition transcripts available, MSA moves to exclude the testimony of both Mr. Bevis and Mr. Bien for the following reasons:

- Neither reviewed Plaintiffs’ depositions in any detail.
- Neither reviewed the underlying data regarding respirable dust conditions at ISP Minerals, but simply relied on the deposition testimony of ISP representative David Dinkins. Mr. Dinkins’ opinions regarding the respirable dust conditions at ISP are not factually supported and have no scientific basis. (See MSA’s Motion to Exclude Expert Testimony of David Dinkins, filed simultaneously with this motion)
- Neither provided the basis for many opinions they offered.
- Both offered opinions based on false assumptions, the most glaring that Mr. Bien testified that Plaintiff always wore and only wore MSA products.

Should this Court deny this Motion to exclude, MSA moves to limit Mr. Bevis and Mr. Bien’s opinions based on their limited expertise and lack of foundation for their opinions. Mr. Bevis expertise, training and experience merely qualify him to testify regarding a respiratory protection plan in general and preclude his opinions relating to adequate respirator design and manufacture. Mr. Bevis holds no college degrees, he is not a certified industrial hygienist, he is not a certified safety professional, and he has never designed or manufactured any respiratory protection devices. Likewise, Mr. Bien’s testimony should be limited and he should not be allowed to offer any opinions regarding Plaintiff’s use of any specific respiratory devices at ISP,

any industrial hygiene opinions including monitoring data done at ISP, any overall opinions regarding ISP's respiratory protection program, or any opinions regarding respirator design. Mr. Bien has no relevant training or experience in establishing or implementing a respiratory protection program, and he has no experience in applicable fit testing and fit checks of air purifying respirators.

Wherefore, MSA moves to exclude testimony offered by Mr. Bevis and Mr. Bien. MSA further requests leave to file its supplemental motions to exclude the testimony of Mr. Bevis and Mr. Bien until September 30, 2010, after which time MSA has received and reviewed the final deposition transcripts.

/s/ Anne B. Callahan

Anne B. Callahan # 5273655

LASHLY & BAER, P.C.

714 Locust Street

St. Louis, Missouri 63101

Telephone: (314) 621-2939

Facsimile: (314) 621-6844

acallahan@lashlybaer.com

ATTORNEY FOR DEFENDANT MINE
SAFETY APPLIANCES COMPANY

PROOF OF SERVICE

I hereby certify that on September 15, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following parties:

- Zane T. Cagle – zane@caglellc.com
- John J. Kurowski - jkurowski@cateskurowski.com
- Lawrence R. King – lking@larsonking.com
- Candice Kusmer – ckusmer@kbslf.com
- Michael B. Martin – mbmartin@maloneymartinllp.com
- W. Jeffrey Muskopf – jmuskopf@lashlybaer.com
- Bernadette Weaver-Catalana – bcatalana@osbornreed.com

/s/ Anne B. Callahan